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No. 08-681

IN THE
Supreme Court of the United States

JEAN MARC NKEN,
Petitioner,
v.
MICHAEL MUKASEY,
UNITED STATES ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In order for Congress to restrict the traditional equitable powers of the courts to issue a stay pending appeal, it must do so clearly and explicitly. Nothing in IIRIRA contains the requisite clear statement. Although Congress made stays of removal orders discretionary rather than automatic in § 1252(b)(3)(B), it did not expressly alter the traditional standard for granting such stays. And when Congress enacted § 1252(f)(2), limiting the authority of courts to issue certain injunctions, it did not mention stays at all. Thus, IIRIRA leaves intact the federal courts' traditional power to grant a stay pending appeal.

Despite the absence of the word "stay" in § 1252(f)(2), the Government contends that section should be understood as radically redefining the traditional stay standard to require a heightened showing on the merits and to eliminate *all* consideration of the equities. None of the Government's arguments in support of that extraordinary reading has merit.

First, the Government asserts that this Court should accord no significance to Congress's choice to use the word "stay" in one section and the word "enjoin" in another, because, in its view, a stay is a type of injunction. That approach ignores the well-settled distinctions between stays and injunctions: an injunction is a coercive order of the court issued *in personam* and punishable by contempt; a stay temporarily deprives an order of the force of law pending further review and is not a coercive order

operating against a person. Both the U.S. Code and the federal rules reflect the distinct meanings of "stay" and "enjoin." No serious plain language approach can treat the two terms as "interchangeabl[e]." *See* Resp. Br. 14.

Second, the Government suggests that the relief Petitioner seeks is not a stay at all, but rather "is naturally characterized as an injunction." *Id.* In the Government's view, a reviewing court can never stay an agency order because the court and the agency are not part of a "'single unified process' in the Article III courts," *id.* at 16, so when a petitioner asks a court to stay his final order of removal, he is in fact asking the court to enjoin the Department of Homeland Security ("DHS") from removing him. But that would surely come as a surprise to Congress, which expressed in § 1252(b)(3)(B) that the relief Petitioner seeks is not an injunction against removal but a "Stay of order." Moreover, the Government's novel "single unified process" theory is flatly at odds with both this Court's precedents concerning stays of agency orders and the existence of the Federal Rule of Appellate Procedure expressly governing them. *See* Fed. R. App. P. 18.

Third, the Government contends that § 1252(f)(2) must extend to stays despite its reference only to injunctions because otherwise § 1252(f)(2) would have no application at all. *See* Resp. Br. 25-26. This argument again assumes that there is no difference between a stay and an injunction. In fact, however, there is—an alien can seek to stay the order of removal, and can separately seek an injunction

against agency officials. Every time an alien seeks an injunction rather than (or in addition to) a stay, § 1252(f)(2) serves to deny that relief unless its stringent standard is met—a situation that would arise, for example, if the agency were to attempt removal in disregard of a stay. The text confirms this: if the sole purpose of § 1252(f)(2) was to limit courts' authority to issue a stay, Congress would have used the term stay, as it did in § 1252(b)(3)(B), rather than the term "enjoin." Additionally, § 1252(f)(2) would apply whenever an individual alien seeks injunctive relief in proceedings collateral to the petition for review process, including habeas corpus proceedings or other district court cases challenging the immigration laws. Such proceedings have continued to arise after IIRIRA. It is thus unnecessary to distort the text of § 1252(f)(2) in order to give the section meaning.

Nor can the Government benefit by emphasizing that the purpose of IIRIRA was to make it harder for petitioners to obtain a stay, because application of the traditional stay standard is entirely faithful to that purpose. The enactment of IIRIRA marked a dramatic shift from a scheme in which stays in most cases were automatic to one in which a petitioner may not obtain a stay without meeting the traditional stay test—a test which even the Government describes as "demanding." *See* Resp. Br. 46. The reality is that under the traditional stay standard, many petitioners will adjudicate their cases from abroad after removal. It is not necessary to read IIRIRA as adopting the Government's draconian approach—in which the equities are

entirely irrelevant—in order to give the statute its intended effect.

Finally, the Government's alternative argument that application of the traditional stay standard requires the denial of relief for Petitioner is beyond the scope of the question on which certiorari was granted. It is also incorrect because Petitioner has a strong likelihood of success and a compelling case on the equities, and thus is entitled to a stay under the traditional standard.

I. THE TEXT AND STRUCTURE OF IIRIRA DEMONSTRATE THAT § 1252(f)(2) DOES NOT APPLY TO STAYS OF REMOVAL ORDERS PENDING APPEAL.

A. The Plain Text of § 1252(f)(2) Contemplates Injunctions, Not Stays.

In § 1252(f)(2), Congress did not use the word "stay." It instead chose the word "enjoin." The Government concedes that "the term 'enjoin' or 'injunction' does not necessarily include a 'stay' in every context." Resp. Br. 18. It nonetheless contends that in this instance, Congress used the terms "interchangeably," *id.* 14, with a stay of removal constituting an injunction because it "require[s] DHS to abstain from . . . remov[ing] . . . [the] alien." *id.* 13 (internal quotation marks omitted; alterations in original). This analysis is flawed.

First, the Government's argument is at odds with the statutory text. In the same provision in which Congress specified that all stays would be

discretionary, it further provided that the stay is a "Stay of order." 8 U.S.C. § 1252(b)(3)(B).[1] Congress thus made clear that the relief Petitioner seeks is a stay of his underlying removal *order*, not an injunction against DHS officials.

Second, the Government's argument is at odds with settled understandings regarding the differences between stays and injunctions. As the Government concedes, the defining feature of an injunction is that it operates *in personam*: it is "'[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury.'" Resp. Br. 13 (citation omitted). A stay of a removal order is not directed at the DHS officials who execute the order; it simply suspends the operation of a final order of removal pending review, and it is directed at the order itself. Indeed, a stay of a removal order is not an injunction precisely because it targets the order and *not* a party.

The Government concedes this distinction, *see* Resp. Br. 16, but denies that it makes a difference, *see id.* 17. It does. A party who violates an injunction faces contempt. *See Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). But a party does not "violate" a stay because the stay is not directed at the party; thus, courts have not imposed contempt

[1] While a provision's title is not necessarily controlling, *see INS v. St. Cyr*, 533 U.S. 289, 308-09 (2001), it is "'of use . . . when [it] shed[s] light on some ambiguous word or phrase,'" *id.* (citation omitted; alterations in original); *see also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999) (invoking the title of § 1252(f) to explain that it is "nothing more or less than a limit on injunctive relief").

sanctions against government agents for executing removal orders that have been stayed. Such action is unlawful, but it is unlawful for the same reason that deporting *anyone* without a valid order of removal is unlawful—because a valid removal order is a legal prerequisite to removal. *See Lazo v. Gonzales*, 462 F.3d 53, 54 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 2909 (2007); 8 U.S.C. § 1227(a). Like a declaratory judgment, a stay of an order "is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt." *Steffel v. Thompson*, 415 U.S. 452, 471 (1974) (internal quotation omitted); *cf. Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993); *H.K. Porter Co. v. Nat'l Friction Prods. Corp.*, 568 F.2d 24, 26-27 (7th Cir. 1977); *Berry v. Midtown Serv. Corp.*, 104 F.2d 107, 111 (2d Cir. 1939).[2]

Third, the Government's argument is at odds with statutes, rules, and a body of jurisprudence reflecting the distinction between stays and injunctions. Not only does appellate jurisdiction

[2] Indeed, Petitioner has not found a single case where the violation of a stay of an order of an inferior court or agency was punished by contempt. Tellingly, where the government has deported an alien while the operative order of removal was stayed, courts have directed issuance of an *in personam* order enjoining the agency from removing the person. *See, e.g.*, *Singh v. Waters*, 87 F.3d 346, 350 (9th Cir. 1996) (directing district court to issue an *in personam* order to the INS "not to violate the stay of deportation"); *cf. Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1306 (N.D. Ala. 2005) (describing court's entry of a preliminary injunction enjoining further violation of a stay). These courts did *not* impose contempt sanctions.

often depend upon this distinction, *see* 28 U.S.C. § 1292(a)(1); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), but different rules apply depending upon whether the relevant court issues a stay or an injunction. *Compare* Fed. R. App. P. 8(a)(2)(B)(i) *with id.* R. 8(a)(2)(B)(iii); *see also id.* R. 18(a)(2)(B)(iii); Fed. R. Civ. P. 65(d)(1); *id.* R. 52(a)(2).[3] Specifically in the agency context, Congress has provided that an "injunctive decree shall specify the federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance." 5 U.S.C. § 702. Stays of agency orders, by contrast, have no such requirement. *See* Fed. R. App. P. 18. Moreover, the courts have followed Congress's lead, applying the federal rules governing *stays* to motions such as Petitioner's. *See, e.g.*, *Koutcher v. Gonzales*, 494 F.3d 1133, 1134-35 (7th Cir. 2007); *Lim v. Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004); *Singh v. Ashcroft*, 375 F.3d 1007, 1008 (10th Cir. 2004). Congress legislated against the backdrop of these rules and well-settled distinctions when it chose the word "stay" in § 1252(b)(3)(B) and "enjoin" in § 1252(f)(2). *See INS v. St. Cyr*, 533 U.S. 289, 312 n.35 (2001).

Nor does the Government's argument find support in the Hobbs Act. *See* Resp. Br. 14-15. The Hobbs Act distinguishes between stays and injunctions: Congress permits a court to issue both a

[3] The Government argues that the district court rules do not apply in the courts of appeals, *see* Resp. Br. 21, but that is beside the point. Within each set of rules, there is a longstanding and operative distinction between stays and injunctions.

"temporary stay" and an "interlocutory injunction" pending review of agency action, 28 U.S.C. § 2349(b), and authorizes "[t]he court of appeals . . . to vacate stay orders *or* interlocutory injunctions previously granted by any court . . . ." *id.* § 2349(a) (emphasis added). In any event, Petitioner does not argue that the terms may *never* be used in combination, but rather that when Congress wishes to do so, it does so explicitly. *See also, e.g.*, 28 U.S.C. § 2283.[4]

B. The Fact That a Stay Limits the Government's Ability to Effectuate Removal Does Not Turn the Stay Into an Injunction.

There is no merit to the Government's contention that the term "enjoin" in (f)(2) must necessarily encompass a stay because a stay prevents an alien's removal. *See* Resp. Br. 13-14.

First, when Congress intends to encompass every form of equitable relief that affects the Government's ability to deport someone, it uses expansive language and not the solitary word "enjoin." It did so in the subsection immediately preceding § 1252(f)(2), *see* § 1252(e)(1)(A) (expressly limiting the availability of "declaratory, injunctive, or *other equitable relief* in any action pertaining to an order to exclude an alien"), and in § 1252(f)(1) (stating that no court shall

[4] The Anti-Injunction Act speaks of an "injunction to stay" state court proceedings because when a federal court enjoins a parallel state court proceeding, it neither "freezes its own proceedings or suspends the operation of its own decisions or those of an inferior court pending further review," Resp. Br. 16; rather, it acts against a distinct sovereign, over which it exercises no supervisory jurisdiction. Thus an "injunction to stay" is required.

have jurisdiction to "enjoin *or restrain*"); *cf. Hecht Co. v. Bowles*, 321 U.S. 321, 328 (1944) (characterizing an order placing proceedings on hold as an "other order" where the statute provided for a "permanent or temporary injunction, restraining order, or other order"). The juxtaposition of § 1252(f)(2) with these subsections belies the Government's assertion that "enjoin," standing alone, is sufficiently "expansive" to encompass stays. *See* Resp. Br. 12.

Second, the Government's argument proves too much. The vacatur of a removal order has the same effect on the government's ability to deport an alien as a stay, yet the Government concedes that a vacatur is not an injunction. *See* Resp. Br. 25. Its explanation is ipse dixit: "a court that concludes that an alien is entitled to relief in connection with a petition for review does not enjoin the removal of [that] alien; instead, [it] vacate[s] the agency's final order of removal." *Id.* (quotation marks omitted; alterations in original). One could just as easily say that a court granting a stay "does not enjoin the removal of that alien; instead, it stays the agency's final order of removal." In fact, a vacatur is not an injunction (despite its similar effect) because a vacatur is not a coercive order issued against a person and punishable by contempt. Instead, like a stay, a vacatur deprives the order of removal of the force of law. Removal following a vacatur or stay is certainly unlawful, not because the agency has "violated" the vacatur or stay, but because it is unlawful for an official to remove someone without a valid removal order.

To be sure, stays and injunctions often have similar effects on the course of a proceeding, and courts have traditionally applied a similar test in evaluating whether to grant a stay or injunction. But that similarity merely reflects that both remedies arise at an early stage of a proceeding, when it is appropriate for the court to consider a party's likelihood of success along with the equities that weigh for and against providing relief at that early time.[5] These similarities do not justify disregarding Congress's use of distinct terms with discrete and well-settled meanings.

C. The Fact That the Order to Be Stayed Came From an Agency Rather Than a Court Does Not Turn the Stay Into an Injunction.

Similarly meritless is the Government's novel argument that a "stay" of an agency order is necessarily an injunction because agency review is not part of a "'single unified process' in the Article III courts."[6] *See* Resp. Br. 16-17.

First Congress routinely references "stays" to denote the suspension of final agency orders pending judicial review. It did so in the Hobbs Act, *see supra*

[5] This also explains why dicta from otherwise inapplicable cases sometimes equate injunctions to stays, *see* Resp Br. 15.

[6] For one thing, this incorrectly assumes that all orders of removal come from an administrative agency. *See, e.g.*, 8 U.S.C. § 1228(c)(1) (granting district courts authority to issue judicial orders of removal at the time of sentencing of certain deportable aliens). The Government does not and cannot plausibly suggest that Congress intended § 1252(f)(2) to apply to administrative, but not judicial, removal orders.

7-8, in other areas of administrative law, *see, e.g.*, 27 U.S.C. § 204(h); 29 U.S.C. § 2937(a)(2); 42 U.S.C. § 300j-9(i)(3)(A), in the Federal Rules of Appellate Procedure, *see* Fed. R. App. P. 18, and in IIRIRA itself, *see* 8 U.S.C. § 1252(b)(3)(B). Indeed, if, as the Government argues, a court can never stay an agency order, then this Court must conclude that when Congress said "Stay of order" in § 1252(b)(3)(B), what it meant was an injunction against the execution thereof. This Court, however, should reject the invitation to rewrite statutes where Congress has made itself clear. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 483, 454 (2002); *U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 498 (1994).

Moreover, this Court has stated clearly that the federal courts have the same inherent power to issue a stay when reviewing an agency order that they have when reviewing a district court order. *See Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-11 (1942); *see also Sampson v. Murray*, 415 U.S. 61, 73-74 (1974) ("A long progression of cases in this Court ha[s] established the authority of a court, empowered by statute to exercise appellate jurisdiction, to issue appropriate writs in aid of that jurisdiction. . . . This Court in *Scripps-Howard* held that the same principles govern[] the authority of courts charged by statute with judicial review of agency decisions, and that the authority to grant a stay exists in such a court . . .").

The Government also suggests that the "unique features of immigration proceedings," Resp. Br. 18—

apparently that orders of removal are self-executing—demonstrate that a stay of an order of removal is an injunction. But the fact that an order is self-executing does not change that the object of a stay of removal is the removal order, not its execution. *See* § 1252(b)(3)(B). Moreover, no statute or procedural rule supports the argument that the distinction between self-executing and non-self-executing agency orders bears on the distinction between stays and injunctions, *see, e.g.*, Fed. R. App. P. 18, a fact that seems particularly relevant because self-executing agency orders are the rule, not the exception. *See NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142-43 (7th Cir. 1992).

In short, that the order on review comes from an agency rather than a district court is irrelevant to the question of whether the relief sought is a stay or an injunction.

D. The Structure of IIRIRA Confirms That § 1252(f)(2) Does Not Apply to Stays Pending Judicial Review.

The Government's position that § 1252(f)(2) encompasses stays cannot be reconciled with numerous structural features of IIRIRA suggesting the contrary. *See* Pet. Br. 32-38.

First, in response to Petitioner's argument that the Government's construction of § 1252(f)(2) renders § 1252(b)(3)(B) surplusage, *see* Pet. Br. 35-36, the Government observes that § 1252(b)(3)(B) serves to "make explicit that [Congress] was eliminating" the prior rule whereby stays were automatic for everyone but certain felons. *See* Resp. Br. 27. But Congress

explicitly eliminated the automatic stay when it repealed 8 U.S.C. § 1105a(a)(3) simultaneous with the enactment of IIRIRA. Congress did not need to enact a separate statutory provision reiterating that § 1105a(a)(3) had been repealed.

Second, the Government's construction of "enjoin" in § 1252(f)(2) deprives the term "restrain" in § 1252(f)(1)—and its disparate exclusion in § 1252(f)(2)—of meaning. The Government's theory that the terms "restrain" and "enjoin" are synonymous, *see* Resp. Br. 28, does not explain why Congress used the phrasing "enjoin or restrain" in § 1252(f)(1) but only "enjoin" in § 1252(f)(2). *See* Pet. Br. 36-37.

Third, the Government contends that "[b]ecause Section 1252(b)(3)(B) does not provide a standard for evaluating stays of removal, it is natural to look to another part of Section 1252 for such a standard." Resp. Br. 24. The Government cites no case in support of this theory, and for good reason: it is not natural to assume that Congress would enact a provision granting courts authority to issue stays in one part of a statute, and then specify the standard for exercising that authority in a different part of the statute that neither cross-references the first provision nor includes the word "stay." This would have been "at best, an awkward and indirect means" to go about it. *Miller v. French*, 530 U.S. 327, 338 (2000). Moreover, if Congress believed it necessary to specify a standard for discretionary stays, it would be odd for Congress to have done so for cases subject to IIRIRA's permanent rules but *not* for transitional

cases, as the Government contends. *See* Pet. Br. 35; Resp. Br. 28. It is much more natural to assume that when Congress repeatedly authorizes courts to issue stays of removal orders without specifying a standard, in provisions using nearly identical language, *see* 8 U.S.C. § 1252(b)(3)(B); IIRIRA § 306(b), 110 Stat. at 3009-612 (repealing 8 U.S.C. § 1105a(a)(3) (1994)); IIRIRA § 309(c)(4)(F), 110 Stat. at 3009-626, Congress intends all such provisions to incorporate the same standard—in this case, the traditional one.[7]

E. Canons of Statutory Interpretation Counsel Against the Government's Interpretation of 1252(f)(2).

Even if § 1252(f)(2) were ambiguous as to whether the use of the word "enjoin" also encompasses stays, the interpretive canons adopted by this Court compel the conclusion that the statute should be read to not apply to stays. *See* Pet. Br. 18-20; *see also Scripps-Howard Radio*, 316 U.S. at 11. The Government maintains that the clear statement rule is inapplicable because its reading of § 1252(f)(2) does

[7] The Government contends that Congress did not apply a heightened standard in transitional cases "in order not to upset automatic stays . . . that were already in effect." Resp. Br. 28. But the transitional rules did not apply to cases in which an automatic stay had already issued, *see* IIRIRA § 309(c)(1) and (c)(4), 110 Stat. at 3009-625-26, and so neither the transitional *nor* the permanent rules under IIRIRA upset existing stays. The Government speculates that Congress chose this course to provide notice to aliens going forward that it would be more difficult to get a stay under the permanent rules. Yet IIRIRA made it substantially more difficult to get a stay under the *transitional* rules since a stay was no longer automatic. More importantly, while Congress *could* certainly choose such an anomalous way of applying new rules, the Government fails to provide any evidence that Congress did.

not *eliminate* the court of appeals' authority to issue a stay; it merely *circumscribes* it. *See* Resp. Br. 42. But this Court has rejected the idea that the clear statement rule applies only to statutes that completely eliminate—rather than merely limit—courts' inherent equitable powers. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (A court's "equitable jurisdiction is not to be denied *or limited* in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, *the full scope* of that jurisdiction is to be recognized and applied." (emphasis added)). Given that the highly constricting standard in § 1252(f)(2) would prohibit courts from issuing stays in all but a narrow set of circumstances, *see infra* at 23-25, and totally prohibits them from considering traditional equitable factors, *see infra* at 23, the Government's reading of § 1252(f)(2) unquestionably strips courts of their "customary power to stay orders under review." *Scripps-Howard*, 316 U.S. at 11.

The Government further posits that this canon does not apply because in IIRIRA, Congress evinced a general intent to "shift discretion from the courts." Resp. Br. 42. This is precisely the sort of inferential reasoning—purpose divorced from text—that the clear statement rule exists to counteract. Because § 1252(f)(2) does not contain the requisite "clear[] command" or "inescapable inference," this Court should not construe the statute to displace the courts' traditional equitable authority. *See Miller*, 530 U.S. at 340.

The Government is also unable to surmount "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Dada v. Mukasey*, 128 S. Ct. 2307, 2318 (2008) (quotation marks omitted). Contrary to the Government's apparent suggestion that the immigration rule of lenity was overruled by a dictum in a case from 1984, *see* Resp. Br. 45, this Court has repeatedly reaffirmed the canon in recent years; *see, e.g.*, *Dada*, 128 S. Ct. at 2318; *St. Cyr*, 533 U.S. at 320. Section 1252(f)(2) is clearly a "deportation statute." This canon of construction therefore applies as well.

In light of these guiding principles, the Government has not met its burden to demonstrate that the text of § 1252(f)(2) unambiguously restricts the courts' inherent equitable power to issue stays.

II. SECTION 1252(f)(2) APPLIES SEPARATE AND APART FROM THE STAY CONTEXT.

Faced with the evidence of IIRIRA's plain meaning, the Government insists that § 1252(f)(2) must apply to stays, or else it would have no application at all. *See* Resp. Br. 25-26. This argument is meritless. Section 1252(f)(2) has application separate and apart from the stay context, and the Government's suggestion that § 1252(f)(2) is *solely* about stays of removal ignores the text and structure of § 1252(f).

Although § 1252(f)(2) was not added to the statute until just before its enactment,[8] and there is virtually no legislative history pertaining to it, *see* Resp. Br. 32 n.8, Congress's evident purpose in enacting § 1252(f)(2) was to clarify that injunctions should be granted only in extraordinary circumstances. Injunctions are uniquely coercive orders, and Congress wanted to limit such injunctions to exceptional individual cases. This purpose is also reflected in § 1252(f)(1), which prohibits injunctive relief in certain class actions.[9]

Contrary to the Government's contention, § 1252(f)(2) has clear application "under this section." *See* Resp. Br. 26. Section 1252(f)(2) applies in every instance when an alien seeks an injunction from the court of appeals in connection with his petition for review. In every such case, § 1252(f)(2) prohibits the court from entering an injunction unless the entry or execution of the alien's removal order is clearly prohibited by law—for example, if DHS attempts removal of an alien in disregard of a stay of the alien's removal order. *See supra* at 6 & 6 n.2. Imposing a high standard for injunctions in the direct review context ensures that in all but the most

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[8] *Compare* H.R. Rep. No. 104-469(I), at 33 (1996) (omitting the provision), *and* S. Rep. No. 104-249, at 34 (1996) (reporting an amendment to eliminate automatic stays, but including no amendment to add (f)(2)), *with* H.R. Conf. Rep. No. 104-863, at 626 (1996) (including new (f)(2)).

[9] Congress may also have wished to negate any inference from § 1252(f)(1) that injunctions for individuals should issue routinely. That is, § 1252(f)(1) expressly bars injunctive relief for class actions, but permits injunctions for individual aliens. Section 1252(f)(2) forestalls any argument that such injunctions are available as a matter of course.

extraordinary cases, the relief available to aliens on direct review of final orders of removal is limited to stays, vacaturs, and the granting of their petition for review. The Government's argument that § 1252(f)(2) "has no application" thus rises and falls with its contention that the stay Petitioner seeks here is really an injunction. Because that contention is wrong, and because an alien could seek either an injunction or a stay (or both), § 1252(f)(2) operates whenever the alien seeks an injunction and not just a stay.

Section 1252(f)(2) also applies where an alien seeks to prevent his removal outside the context of a petition for review, both in habeas proceedings and in "general collateral challenges to unconstitutional practices and policies used by the agency." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492 (1991). Congress gave multiple indications of its intent that § 1252(f)(2) applies in these contexts. As the Government itself notes, *see* Resp. Br. 12, Congress applied § 1252(f)(2) to *all* courts rather than just the courts of appeals. *Compare* § 1252(f)(2), *with* § 1252(b)(4)(A), § 1252(a)(4), *and* § 1252(a)(5). Congress also addressed § 1252(f)(2) to "any alien" rather than "any petitioner." *Compare* § 1252(f)(2), *with* § 1252(e)(4), § 1252(b)(5)(A), *and* § 1252(b)(6). Moreover, Congress centered the court's inquiry in § 1252(f)(2) on whether the "entry or execution" of a removal order is clearly prohibited by law, not whether the removal order itself is unlawful. Because direct review in the court of appeals is focused on the order itself, *see* § 1252(b)(9), this phrasing in § 1252(f)(2) suggests

that Congress envisioned it would apply in collateral attacks challenging the way a removal order was entered or executed. Finally, this Court has made clear that Congress did not totally preclude habeas review of a removal order in IIRIRA. *See St. Cyr*, 533 U.S. at 311 n.34, 312.[10]

Indeed, it is hardly "difficult to imagine" a collateral challenge in which an alien might seek an injunction against removal. *See* Resp. Br. 25. As the Government is well aware, aliens have sought and obtained such injunctive relief against removal in collateral challenges since IIRIRA's enactment, and notwithstanding §§ 1252(b)(9) and (g). *See, e.g.*, *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1145, 1150 (9th Cir. 2000) (en banc) ("*CSS*"); *Walters v. Reno*, 145 F.3d 1032, 1051-53 (9th Cir. 1998); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (9th Cir. 1999), *supplemented by*, 236 F.3d 1115 (9th Cir. 2001); *cf. Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227, 1232-33 (9th Cir. 2007); *see also Aguilar v. U.S. Immigr. & Customs Enforcement Div. of Dep't of Homeland Security*, 510 F.3d 1, 10-12 (1st Cir. 2007) (stating that § 1252(b)(9) "cannot be read to swallow all claims that might somehow touch upon, or be traced to, the government's efforts to remove an alien"). In all such cases, an individual seeking an injunction must overcome the standard

[10] While the REAL ID Act of 2005 modified the ability of aliens to pursue habeas relief in the district courts, *see* REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a), 119 Stat. 231, 310 (codified at 8 U.S.C. § 1252(a)(5)), this does not alter Congress's intent in 1996 *nunc pro tunc*. And pursuant to § 1252(e)(2), habeas relief remains available to aliens subject to expedited removal.

set forth in § 1252(f)(2) in order to enjoin his removal, and contrary to the Government's argument, *see* Resp. Br. 25-26, neither § 1252(b)(9) nor § 1252(g) precludes jurisdiction. *See CSS*, 232 F.3d at 1150 ("As interpreted by the Supreme Court . . . , [§ 1252(g)] applies only to the three specific discretionary actions mentioned in its text, not to all claims relating in any way to deportation proceedings."). The Government's further observation that § 1252(f)(2) has not yet been invoked in these contexts merely reflects the Government's legal strategy and its own reading of the section, *not* Congress's intent.

In any event, the Government's suggestion that § 1252(f)(2) was intended to apply *only* to requests for stays is contrary to the text. If Congress intended § 1252(f)(2) to extend only to stays, it surely would not have used two different words—"stay" in § 1252(b)(3)(B) and "enjoin" in § 1252(f)(2)—to mean precisely the same thing. In fact, Congress intended § 1252(b)(3)(B) to govern stays and § 1252(f)(2) to provide the standard for injunctive relief, not stays. Section 1252(f)(2) is simply not the magic bullet that the Government claims it to be.

III. APPLYING THE TRADITIONAL STAY STANDARD FURTHERS THE PURPOSE OF IIRIRA, WHILE AVOIDING THE DISASTROUS CONSEQUENCES OF APPLYING THE § 1252(f)(2) STANDARD.

Lacking support in the text and structure of IIRIRA, the Government insists that only its reading of § 1252(f)(2) is consistent with the purpose of the

statute. But even if the perceived purpose of IIRIRA could override its plain text, the Government cannot benefit because Petitioner's interpretation is entirely faithful to IIRIRA's purpose.

First, under Petitioner's approach, it is substantially more difficult to obtain a stay of removal after IIRIRA than it was beforehand. Prior to IIRIRA, most petitioners were entitled to an automatic stay pending judicial review. After IIRIRA, a petitioner may obtain a stay of his final order of removal only if he can meet the traditional four-factor test—which even the Government describes as "demanding." *See* Resp. Br. 46. More than a mere "possibility" of relief is required, *see* Resp. Br. 47, and stays are certainly not automatic. Indeed, in the eight circuits that have applied the traditional test since 1996, stays are regularly denied, including in some of the very cases in which the circuits determined that § 1252(f)(2) did not apply. *See Hor v. Gonzales*, 400 F.3d 482 (7th Cir. 2005); *Mohammed v. Reno*, 309 F.3d 95 (2d Cir. 2002); *Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001) (en banc); *cf. Lim*, 375 F.3d at 1012. Interpreting IIRIRA to require petitioners to meet the traditional stay standard in no sense "thwarts Congress's purposes," Resp. Br. 35, and there is no merit to the Government's suggestion that its interpretation is necessary to ensure that illegal aliens "do not overstay their welcome," *id.*

The Government's argument that applying the traditional stay standard would encourage illegal aliens to delay their removal by filing non-

meritorious petitions is specious.[11] *See* Resp. Br. 36. As noted, the traditional stay standard is a rigorous one under which frivolous motions are expeditiously denied.

Moreover, as noted in Petitioner's Opening Brief, the Government's reading of § 1252(f)(2) would produce extraordinarily harsh consequences. *See* Pet. Br. 40-46. In an effort to mitigate those consequences, the Government offers a novel construction of § 1252(f)(2)'s standard. Section 1252(f)(2) requires "clear and convincing evidence that the entry or execution of [a final removal order] is prohibited as a matter of law." The Government argues here that this provision is really two standards in one: § 1252(f)(2) requires aliens to prove fact-based claims by clear and convincing evidence, and to show "that they are entitled to judgment as a matter of law" on legal claims. *See* Resp. Br. 37-38. That splitting of § 1252(f)(2)'s unitary test is contrary to the Government's position before the Fourth Circuit. *See* Resp. Opp. to Pet. Mot. to Stay Removal, No. 08-1813, at 8 (4th Cir. filed Aug. 13, 2008) (arguing that a petitioner must show "'by clear and convincing evidence' that his removal is 'prohibited by law,'" and that this standard "demands 'more than [a] show[ing of] a likelihood of success on the merits.'" (citations

[11] The Government's use of statistics, *see* Resp. Br. 36, confuses causation with correlation; the courts of appeals could have disparate filing rates for petitions for review due to a host of unrelated explanations, including, e.g., geographic differences, variances in the ease of obtaining appellate counsel, and a higher rate of agency error as between different circuits. *See generally* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007).

omitted)). Although Petitioner certainly welcomes the Government's retreat, that it must strain the text in an attempt to lessen the impact of an unduly harsh standard confirms that the Government's reading of IIRIRA has little to recommend it.[12]

In any event, even the Government's interpretation would have grave consequences because it *completely forbids* the courts from considering equitable factors in deciding a petitioner's stay motion. The Government does not dispute that its interpretation would forbid consideration of the equities or of the possibility of irreparable harm. The Government would require courts to deny a stay to every petitioner with a 90% risk of being killed if removed and a 50% chance of succeeding on the merits. *See Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305 (2003) (Kennedy, J., in chambers) ("If the exacting standard of § 1252(f)(2) applies to requests for temporary stays, then to obtain judicial review aliens subject to removal must do more than show a likelihood of success on the merits."). Indeed, in the two circuits that have adopted the (f)(2) standard, stays are virtually never granted. *See* Am. Immigration Lawyers Ass'n ("AILA") Br. 8 & n.7.

The Government dismisses these concerns by recasting them as an argument against the

[12] Most circuit courts have interpreted § 1252(f)(2) as creating a harsher standard than that articulated by the Government. *See, e.g.*, *Teshome-Gebreegziabher v. Mukasey*, 528 F.3d 330, 335 n. 5 (4th Cir. 2008), *reh'g en banc denied*, 545 F.3d 285 (4th Cir. 2008); *Hor*, 400 F.3d at 483; *Andreiu v. Ashcroft*, 223 F.3d 1111, 1118 (9th Cir. 2000), *rev'd en banc sub nom. Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001).

imposition of any standard other than an automatic stay. *See* Resp. Br. 39-40. Such a contention misreads both Petitioner's argument and the traditional stay test. When a petition has little or no chance of success, removal may well be appropriate, notwithstanding a high likelihood of harm. But where the petitioner's likelihood of success is strong (though not "clear and convincing"), it would be perverse to ignore the certainty of death or torture that would result from removal. This Court should not presume that Congress has deprived the courts of their inherent power to avoid such unjust results absent an unambiguous statement to that effect. *See Miller*, 530 U.S. at 340.

Similarly unpersuasive is the Government's assurance that a Petitioner raising meritorious claims would remain protected by DHS's discretionary power to issue a stay. First, it appears that the Government has previously taken the opposite position, *see Sofinet v. INS*, 188 F.3d 703, 706-07 (7th Cir. 1999), even though the then-applicable regulations were similar in relevant respects to the regulations cited in the Government's brief. *Compare* Resp. Br. 41 (citing 8 C.F.R. § 241.6 (2008)), *with* 8 C.F.R. § 241.6 (1999). Second, a discretionary stay from DHS is, in practice, extraordinarily difficult to obtain. An immigrant seeking a discretionary administrative stay must meet multiple onerous requirements, some of which would be impossible for many immigrants. *See* U.S. Immigration and Customs Enforcement, *Application for a Stay of Deportation of Removal*, *available at* http://www.ice.gov/doclib/pi/forms/iceform_i-246.pdf;

see also AILA Br. 22-28. Third, as noted in Petitioner's opening brief, the high rate of error in administrative immigration courts suggests that the agency would not provide stays in all—or even most—cases where they were warranted. *See* Pet. Br. 43-44; *see also* AILA Br. 12-21. Finally, Congress has expressed, in § 1252(b)(3)(B), a desire for stays to also be available in the courts of appeals, implying that Congress itself recognized that agency relief is sometimes unavailable, inadequate, or erroneously denied.

In addition, the Government concedes that even its new interpretation of § 1252(f)(2) does not avoid the problem that aliens seeking a stay of removal would have to meet a higher—or at the very least, similar—burden to obtain a stay as they would to prevail on the merits. *See* Resp. Br. 38 (characterizing the § 1252(f)(2) standard as "similar to that on merits review."). As a result, the Government's proposed regime renders merits review entirely beside the point: resolution of a petitioner's entitlement to a stay will foreordain resolution of the merits. Requiring resolution of the same question twice would be, at the very least, a peculiar way to structure judicial review. Given the lack of textual or other support suggesting that this was Congress's intent, this Court should hold that the traditional stay standard governs motions to stay final orders of removal.

IV. WHETHER PETITIONER IS ENTITLED TO A STAY UNDER THE TRADITIONAL FOUR-FACTOR TEST IS NOT A QUESTION BEFORE THE COURT, AND IN ANY EVENT, PETITIONER MEETS THE TEST.

The Government argues in the alternative that Petitioner is not entitled to a stay under the traditional standard, or that the test should be reformulated to deny him a stay. *See* Resp. Br. 46-48. This argument is not fairly within this Court's limited grant of certiorari, which asks only which standard should apply. *See Nken v. Mukasey*, 129 S. Ct. 622 (2008).[13] Whether Petitioner is entitled to a stay under the traditional test is not fairly within the scope of this limited question. *See* Sup. Ct. R. 24(1)(a) & (2).

Even if application of the traditional stay test was fairly within the scope of certiorari, that test is well-settled and there is no need to recast it here. This Court has clearly stated that the four factors a court considers in deciding whether to grant a stay are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured

[13] This Court's order of November 25, 2008 stated:

> [T]he petition for a writ of certiorari is granted limited to the following question: "Whether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in section 242(f)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1252(f)(2), or instead by the traditional test for stays and preliminary injunctive relief."

Nken v. Mukasey, 129 S. Ct. 622 (2008).

absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The fact that the courts of appeals have articulated these factors in different ways is unsurprising; as this Court has recognized, "[s]ince the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules." *Id.* at 777.

Petitioner is entitled to a stay under the traditional test for the reasons set forth in Petitioner's submissions in support of his Application for a Stay. *See* Pet'r's Emergency Mot. for a Stay of Removal Pending Adjudication of the Pet. for Review in the U.S. Ct. of Appeals for the Fourth Circuit, No. 08A413 (U.S. filed Nov. 7, 2008); Pet'r's Reply in Support of Emergency Mot. for a Stay of Removal Pending Adjudication of the Pet. for Review in the U.S. Ct. of Appeals for the Fourth Circuit, No. 08A413 (U.S. filed Nov. 18, 2008). For the reasons stated therein, this Court should decline to lift the stay it has already granted. In the alternative, however, it should vacate the Fourth Circuit's order denying Petitioner's motion to stay his final order of removal and remand to the Fourth Circuit for consideration of Petitioner's motion under the traditional stay standard.

CONCLUSION

The Court should maintain the stay that it ordered on November 25, 2008, or in the alternative, should vacate the Fourth Circuit's order denying

Petitioner's motion to stay his final order of removal and remand for reconsideration of his motion under the traditional stay standard.

Respectfully submitted,

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